No. 79-1617

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In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF OKLAHOMA EX REL. DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA, PETITIONER

v.

MRS. C. V. PILE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a ban on billboards in areas adjacent to highways in the federal-aid highway system and outside of commercial and industrial zones would violate the First Amendment if it applied to billboards with noncommercial messages.

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This brief is filed in response to the Court's invitation of June 2, 1980, to the Solicitor General to express the views of the United States.

STATEMENT

1. The Oklahoma Outdoor Advertising Control Act (Okla. Stat. tit. 69, § 1271 *et seq.* (West 1969 & Cum. Supp. 1979-1980)) was enacted to protect the public investment in public highways, to preserve the scenic beauty of lands bordering public highways, and to promote public safety, health, and welfare, and the convenience and enjoyment of the traveling public. § 1271 (West Cum. Supp. 1979-1980). When this action was brought, the Act regulated outdoor advertising visible from the "main-traveled" way and within 660 feet of the nearest edge of the right-of-way on any interstate or primary highway. § 1273(m) (West 1969).[1] Under the Act, no signs may be erected or maintained in a control area except for (§ 1274 (West 1969)):

> (a) Informational and other official signs, including, but not limited to, signs pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, and which comply with regulations which shall be promulgated by the Department relative to their lighting, size, number, spacing, and such other requirements as may be appropriate to implement this Act, provided,

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[1] As amended in 1978, the Act has expanded control to include both those areas within 660 feet of the nearest edge within urban areas and those areas visible from the main traveled way outside of urban areas. § 1273(m) (West Cum. Supp. 1979-1980). The title of the statute as first enacted was the "Highway Advertising Control Act of 1968"; a comprehensive set of 1972 amendments was called the "Highway Advertising Control Act of 1972." We refer to the statute by the name used by petitioner (Pet. 5).

however, that such regulations shall not be inconsistent with, nor more restrictive than, such national standards as may be promulgated from time to time by the Secretary of the Department of Transportation of the United States pursuant to federal law.

(b) On-premise activities signs advertising activities conducted on the property on which they are located, including but not limited to, goods sold, stored, manufactured, processed or mined thereon; services rendered thereon; and entertainment provided thereon.

(c) On-premise sale or lease signs advertising the sale or lease of property upon which they are located.

(d) Signs in existence in business areas on the effective date of this Act and signs erected within six (6) months thereafter upon property in business areas leased prior to said effective date, subject to the conditions set forth in Section [1278].

(e) Signs which are to be erected in business areas and which will comply when erected with the provisions of Section [1275] of this Act, and after the applicable provisions of Section [1277] are met.

The statute provides standards for signs allowed in business areas, regulating type, size, spacing, and lighting. § 1275 (West Cum. Supp. 1979-1980). Licenses and permits are required for all outdoor advertising structures other than "on-premise" signs. § 1277 (West Cum. Supp. 1979-1980).[2]

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[2]"On-premise sign" is defined as follows in Oklahoma's regulations (Oklahoma Transportation Commission Rules, Regulations, Policies, and Procedures Adopted Dec. 6, 1976 (Revised Feb. 6, 1980), Art. IX-C, § 4(b)):

> Signs consisting solely of the name of the establishment or which identify the establishment's principal or accessory

The Oklahoma Act was designed to satisfy requirements of the Highway Beautification Act of 1965, 23 U.S.C. 131 *et seq.*, which Congress enacted to control outdoor advertising signs in areas adjacent to highways in the nation's "Interstate System and * * * primary systems." 23 U.S.C. 131(a).[3] The Beautification Act has safety and scenic preservation goals similar to those of the Oklahoma statute. *Ibid.* Under the Beautification Act, the federal government may reduce by 10% the federal highway funds allotted to any state that does not provide "effective control" of highway signs. 23 U.S.C. 131(b). "Effective control" is defined by the Act (23 U.S.C. (Supp. II) 131(c)) and by the United States Department of Transportation's implementing regulations (23 C.F.R. 750.705).[4] Notwithstanding its role in triggering the enactment of the Oklahoma statute, the Beautification Act was not directly involved in the decisions of the courts below.

2. On April 30, 1973, respondent applied for a permit to register an outdoor advertising structure she had

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products or services offered on the property, and signs advertising the sale or lease of property on which they are located, are considered on-premise signs. Signs located on narrow strips of land contiguous to the advertised activity when the purpose clearly is to circumvent the Oklahoma Highway Advertising Control Act shall not qualify as on-premise signs.

[3] "Interstate and primary system highways" are defined at 23 C.F.R. 470.105(a)-(b). See also 23 C.F.R. 470.107. We are advised by the Department of Transportation that these two systems constitute about eight percent of all highways in the United States and most of the major interstate highways. Federal Highway Administration, U.S. Department of Transportation, *Highway Statistics—1978*, at 133, 149 (1979). All 50 states have enacted outdoor advertising laws similar to the one at issue here in order to receive full federal highway funding.

[4] These provisions are set out in an Appendix to this brief.

erected (Exh. A to Plaintiff's Brief in Opposition to Defendant's Demurrer). According to the permit application, respondent had erected the structure in October 1972; it is 41½ feet from U.S. Highway 270 and rises to a height of about nine feet above the ground, with two panels (V-type), each four feet high and eight feet wide. The message on each panel, according to the application, is "GET US OUT OF THE UNITED NATIONS." On January 14, 1976, the Oklahoma State Highway Commission notified respondent that the sign was unlawful under the Outdoor Advertising Control Act and that she had 90 days to remove it (Attachment to Plaintiff's Petition for Mandatory Injunction). Respondent took no action.

3. On December 21, 1976, the Oklahoma Department of Transportation filed in the District Court in and for Harper County a petition for mandatory injunction. The petition alleged that the sign was erected after the effective date of the Act, and is unlawful under its terms since the structure is within 660 feet of a highway within the federal-aid primary highway system and is not in a "business area" as defined by the statute. The petition requested the district court to order the removal of respondent's advertising structure.

On February 11, 1977, respondent demurred to the petition on the ground that it did not state a cause of action. Respondent argued that the Oklahoma Outdoor Advertising Control Act does not apply to noncommercial messages. The trial court sustained respondent's demurrer on September 20, 1977, finding that the petition did not state facts sufficient to constitute a cause of action (Pet. App. B). In ruling from the bench, the trial judge expressed his opinion (Pet. App. A4) that "if this statute were to be applied to this particular defendant and this particular sign * * * it would be an infringement upon

the first amendment rights of the defendant to express herself on political issues."

4. The State appealed to the Oklahoma Supreme Court, which, with one justice dissenting in full and one dissenting in part, affirmed the trial court (Pet. App. A1-A18).

The Oklahoma Supreme Court held (Pet. App. A10) that the constitutionality of the Oklahoma Outdoor Advertising Control Act would be subject to "serious" doubt were the Act's restrictions to be construed as applicable to "non-commercial speech." To avoid the constitutional problem it perceived, the court concluded (*ibid.*) that the statutory definitions of " 'sign,' 'outdoor advertising,' [and] 'outdoor advertising device,' " which define the Act's coverage (Okla. Stat. tit. 69, § 1273(a) (West Cum. Supp. 1979-1980)), "[do] not cover non-commercial speech." The court found the statute "easily susceptible" to this reading (Pet. App. A10).

In determining that without this narrowing construction the statute would be of doubtful constitutionality, the court cited (Pet. App. A3, A4) both the First Amendment to the United States Constitution and Article 2, Section 22 of the Constitution of Oklahoma, which provides, *inter alia*, that "[e]very person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right * * *." The court equated the application of the Act's location restrictions on outdoor advertising to noncommercial signs with "prior restraints" on free speech in a "public forum" (*i.e.*, highways), sustainable only on a showing of "clear and present danger" to public interests (Pet. App. A5-A7, A9). The court rejected (Pet. App. A8-A10), as inadequate justifications, the State's interest in preserving scenic beauty and promoting public safety, concluding that

aesthetic goals are not compelling state interests (*id.* at A8) and that the Act's exemptions for certain areas and certain signs were inconsistent with its stated objective of promoting safe driving (*id.* at A9-A10).

Each of the dissenting justices was of the view that respondent's demurrer should not be sustained because the State was thereby deprived of an opportunity to prove that the Act served governmental interests that would justify the place and manner restrictions it imposed on billboards like the one erected by respondent (Pet. App. A15).

DISCUSSION

We believe that the Oklahoma Supreme Court was incorrect in suggesting that the place and manner restrictions specified by the Oklahoma Outdoor Advertising Control Act would violate the First Amendment if applied to billboards with noncommercial messages. Because the court also rested its decision on a free speech provision of the Oklahoma Constitution that is arguably broader than the First Amendment, however, the holding may be supported by an adequate and independent nonfederal ground; a remand of the case for clarification on that point would, accordingly, be appropriate. On remand, the Oklahoma Supreme Court might also deem it useful to remand the case to the trial court for the taking of evidence that would provide a better basis for deciding the federal constitutional issue, if the decision does not rest independently on an adequate nonfederal ground.

1. A jurisdictional question arises because the decision of the Oklahoma Supreme Court may be supported by an adequate and independent nonfederal ground. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). In our view, the problem is not that the court merely construed, rather than invalidated, a state statute,

for that construction was evidently made under constitutional compulsion and hence would not provide an independent ground. *Mental Hygiene Dep't* v. *Kirchner*, 380 U.S. 194, 198 (1965); *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 554-555 (1940). Thus, the court held (Pet. App. A8-A10) that the statute was a restriction on free speech that could be justified only by a showing of clear and present danger, and it rejected the State's justifications. It announced, moreover, that it was "bound" to interpret the statute in a manner that "avoids constitutional doubt" (*id.* at A10). The jurisdictional question arises, we submit, because, in discussing the constitutional issue, the court cited (Pet. App. A3-A4) both the First Amendment to the federal Constitution and Article 2, Section 22—the free speech guarantee—of the Oklahoma Constitution.

While the court did not state that the Oklahoma constitutional provision is broader than the First Amendment and, while it has employed a single analysis in previous decisions citing the two constitutional guarantees (see, *e.g.*, *Hennessey* v. *Independent School Dist. No. 4, Lincoln County, Okla.*, 552 P.2d 1141 (1976)), the fact remains that the language of the Oklahoma provision does not simply track that of the First Amendment. Indeed, it is substantially similar to a provision in the California Constitution (Art. 1, § 2), that the California Supreme Court has construed as providing protections broader than the First Amendment. *Pruneyard Shopping Center* v. *Robins*, No. 79-289 (June 9, 1980), slip op. 4.[5] "While we might speculate from the

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[5]In *Metromedia, Inc.* v. *City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), appeal pending, No. 80-195, and cert. pending, No. 80-196, however, the California Supreme Court held that a city ordinance banning off-site billboards did not violate either the federal or the California free speech constitutional

choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment" of the court below, it cannot be said "with any degree of certainty" that the judgment "was not based on an adequate and independent nonfederal ground." *Mental Hygiene Dep't* v. *Kirchner*, *supra*, 380 U.S. at 196-197.[6] Were the Court to assume that the First Amendment was ultimately the sole basis for the judgment, the Oklahoma Supreme Court could, "in another case presenting the same issues[,]" announce that the decision had an independent basis in the Oklahoma Constitution, leaving "the result untouched by whatever conclusions this Court might have reached on the merits of the federal question." *Id.* at 197.

If the Court agrees that the substantial reliance of the court below on this Court's precedents is not sufficient to resolve the ambiguity, we suggest that the Court, as it has done on such occasions in the past, vacate the lower court's judgment and remand the case to the Oklahoma Supreme Court for clarification. *California* v. *Krivda*, 409 U.S. 33 (1972); *Mental Hygiene Dep't* v. *Kirchner, supra,* 380 U.S. at 196-197; *Minnesota* v. *National Tea Co., supra* 309 U.S. at 555-557. See also *Air Pollution*

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guarantees. 610 P.2d at 416-420, 164 Cal. Rptr. at 519-523. The court construed the law as applying only to permanent signs used for the display of "a commercial or other advertisement to the public." 610 P.2d at 410 n.2, 164 Cal. Rptr. at 513 n.2. The court distinguished the decision in the present case as one in which the holding "is limited to a question of Oklahoma constitutional law." 610 P.2d at 417 n.13, 164 Cal. Rptr. at 520 n.13.

[6]The court below describes the First Amendment as a protection that existed "in addition to" the Oklahoma free speech guarantee (Pet. App. A4), but we do not regard that as a sufficient indication that the court regards its constitutional provision as having a significance independent of the First Amendment.

Variance Board of Colorado v. *Western Alfalfa Corp.*, 416 U.S. 861, 866 (1974).

2. Of course, the court below was correct in stressing (Pet. App. A5) that freedom of speech is a fundamental liberty, protected by the First Amendment (through the Fourteenth Amendment) from unreasonable or "dubious intrusions" by the States. We believe, however, that the state court's conclusion that the Oklahoma Outdoor Advertising Control Act would be of doubtful constitutionality if applicable to billboards with noncommercial messages is based at least in part on a serious misapplication of this Court's First Amendment precedents.

It is settled that the exercise of free speech rights—whether the message is commercial or noncommercial—may be limited by reasonable time, place, and manner regulation unrelated to the content of the message. *Consolidated Edison* v. *Public Service Comm'n*, No. 79-134 (June 20, 1980), slip op. 4-5; *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). Such regulation is permissible because "various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison* v. *Public Service Comm'n*, *supra*, slip op. 5. "Independently of the message * * * convey[ed], the form of [a] communication may be offensive—perhaps because it is too loud or too ugly in a particular setting." Slip op. 3 (Stevens, J., concurring) (footnotes omitted). On the other hand, regulation of methods of speech is reasonable only where it "serve[s] a significant governmental interest and leave[s] ample alternative channels for communication." Slip op. 4-5.

The Oklahoma statute at issue regulates the location of a particular form of mass communication—the billboard. Respondent is free to express any views she wishes on any

subject matter, but she may not do so on a billboard erected within specified areas adjacent to the highways covered by the statute, including areas visible from the main-traveled way of rural highways that are controlled under the Act.[7] This Court has long recognized that outdoor advertising in general, and billboards in particular, pose problems that justify government regulation. See *Packer Corp.* v. *State of Utah*, 285 U.S. 105, 110 (1932); *St. Louis Poster Advertising Co.* v. *City of St. Louis*, 249 U.S. 269, 274 (1919); *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529-530 (1917). Cf. *Fifth Avenue Coach Co.* v. *City of New York*, 221 U.S. 467, 482-483 (1911).[8] Most notably, billboards are visually intrusive, thrust "before the eyes of observers * * * to be seen without the exercise of choice or volition on their part[,]" since, unlike a radio, billboards cannot be "turned off." *Packer Corp.* v. *State of Utah*, *supra*, 285 U.S. at 110 (Brandeis, J.), quoted in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974) (opinion of Blackmun, J.). Where this Court has struck down regulation of visual

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[7]It is possible that under the Oklahoma Act's exemption for on-premise signs describing activities conducted on the property on which such signs are located (Okla. Stat. tit. 69, § 1274(b) (West 1969)), respondent may erect a sign similar to the one concerned here on a showing that the sign is on her residential premises and that activities related to the message on the sign are conducted there. We do not know that respondent's sign, as described in the record, would qualify for the exemption; but as explained below (pages 15-16 & note 12, *infra*), respondent did not claim the exemption and the factual record is deficient with respect to its applicability. Oklahoma's future construction of that exemption could be influenced by federal policies to be determined in rulemaking proceedings by the United States Department of Transportation (see pages 16-17, *infra*).

[8]Indeed, Mr. Justice Douglas took favorable note of the restrictions on billboards imposed by the Highway Beautification Act of 1965, 23 U.S.C. 131 *et seq.*, the statute that induced the enactment of the Oklahoma Act. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 306 (1974) (concurring opinion).

distractions on the highways, it has done so only because the regulation was based on content rather than on the traffic hazards or the intrusions on privacy that the general class of such distractions may impose. *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 212 & n.9, 214-215 (prohibition of the exhibition, by drive-in movie theaters, of films featuring nudity where the screen is visible from the street).

Both the Oklahoma Act and the federal Highway Beautification Act of 1965, on which the Oklahoma Act and other state outdoor advertising statutes are modelled, reflect legislative determinations that control of billboards along highways is essential to the protection of public safety on the highways and, outside of commercial and industrial zones, to the preservation of the natural beauty of the adjoining lands. 23 U.S.C. 131(a); Okla. Stat. tit. 69, § 1271 (West Cum. Supp. 1979-1980). Whatever their message—commercial or noncommercial—billboards pose traffic safety hazards and blight the landscape. Recognizing the legitimacy of these governmental objectives, state supreme courts have almost uniformly rejected First Amendment challenges to billboard regulation. See, *e.g.*, *Metromedia, Inc.* v. *City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), appeal pending, No. 80-195, and cert. pending, No. 80-196; *Washington* v. *Lotze*, 92 Wash. 2d 52, 593 P.2d 811, appeal dismissed for want of a substantial federal question, 444 U.S. 921 (1979); *Newman Signs, Inc.* v. *Hjelle*, 268 N.W. 2d 741 (N.D. 1978), appeal dismissed for want of a substantial federal question, 440 U.S. 901 (1979); *Lubbock Poster Co.* v. *City of Lubbock*, 569 S.W.2d 935 (Tex. Ct. Civ. App. 1978), cert. denied, 444 U.S. 833 (1979); *Stuckey's Stores, Inc.* v. *O'Chesky*, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed for want of a substantial federal question, No. 79-1233 (May 12, 1980); *Veterans of Foreign Wars* v. *City of Steamboat*

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Contrary to respondent's suggestion (Br. in Opp. 6), some of the reported decisions rejecting First Amendment

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[9]One of the features of the Redwood City ordinance deemed unconstitutional by the Ninth Circuit was its provision for summary seizure of temporary political campaign signs. *Baldwin* v. *Redwood City*, *supra*, 540 F. 2d at 1373-1374. Under the Oklahoma Act, however, removal of an unlawfully placed sign can occur only after 90 days' notice to the owner of the sign or to the landowner, if the sign owner cannot be identified. Okla. Stat. tit. 69, § 1280(d) (West Cum. Supp. 1979-1980). Under the federal program in which Oklahoma and other states participate, compensation must be paid for the removal of any sign that conformed to state law at the time it was erected but that does not now conform to federal requirements. 23 U.S.C. (& Supp. II) 131(g). The federal government pays 75% of the compensation (*ibid.*), and removal is not mandated by the federal statute if the federal share of compensation is not available for payment. 23 U.S.C. 131(n).

challenges to billboard regulation recognized that the statute under consideration applied to stationary signs generally, without distinction between commercial and noncommercial messages. See, *e.g.*, *Washington* v. *Lotze*, *supra*; *Veterans of Foreign Wars* v. *City of Steamboat Springs*, *supra*; *Donnelly Advertising Corp.* v. *Mayor and City Council of Baltimore*, *supra*. Even more significantly, in two cases which this Court has dismissed for want of a substantial federal question, appellants attacking billboard regulation laws raised the issue of political speech in their jurisdictional statements. *Washington* v. *Lotze*, *supra*; *Suffolk Outdoor Advertising Co.* v. *Hulse*, *supra*.

3. The Oklahoma Supreme Court reached a contrary conclusion with respect to the Oklahoma statute, insofar as it might be construed to apply to noncommercial speech, by erroneously characterizing the regulation of highway billboards as an unlawful "prior restraint" of expression in an appropriate "public forum," permissible only on a showing of "clear and present danger of serious and substantial evil" (Pet. App. A6).

The Oklahoma Act, of course, like any permit scheme, can technically be labelled a prior restraint on free expression, but it possesses none of the essential characteristics of the schemes deemed by this Court to warrant such a label. Unlike the statutes challenged in prior restraint cases decided by this Court, the Oklahoma statute does not create a standardless program vesting substantial discretion in a local official and thereby creating the danger that the official will base his decision on his personal evaluation of the content of a message. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553, 555 (1975); *Schneider* v. *State*, 308 U.S. 147, 163-164 (1939). See also *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976) (plurality opinion).

The Oklahoma statute makes it clear where billboards are prohibited and where they are allowed; and the distinction does not turn on subjective criteria.

The state court's ruling that the highway is a "public forum" erroneously equates highways—on which motorists may generally travel at the maximum speed permissible in a state—with city streets, traditionally the scene of picketing, leafleting, parades, and similar activities not well adapted to an environment of high speed vehicular traffic. See *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 306 (Douglas J., concurring) ("[A] streetcar or bus is plainly not a park or sidewalk or other meeting place * * * any more than is a highway.").[10]

The court's erroneous conclusion that restricting the right to erect billboards near highways constitutes a prior restraint on free expression in a public forum is of more than academic significance; for it led the court to reject (Pet. App. A8) the idea that aesthetic purposes, such as a concern for preserving scenic beauty from the clutter of signs, could serve as even a partial justification for the Oklahoma statute, and it also accounts for the court's refusal (*id.* at A9 n.3) to consider the availability of other channels of communication for respondent's message.

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[10] This is not to say that reasonable restrictions on the location of billboards within urban areas are unconstitutional. See *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941); *Metromedia, Inc.* v. *City of San Diego*, *supra*.

4. While the court acknowledged (Pet. App. A8-A9) the substantiality of traffic safety as a justification for a law restricting particular forms of expression, it declined to accept this rationale for the Oklahoma law because the restriction on highway signs was not absolute. The court thereby ignored the common-sense basis for the distinction between commercial or industrial zones, where signs do not stand apart from the landscape and command attention, and rural areas bordering highways, where the impact of such signs is more substantial. It also ignored the logic of the narrowly drawn distinction between on-premise signs—those describing activities conducted on the property on which the sign is located—and off-premise signs. The former are essential to public convenience and to the owners of establishments that members of the public may have reason to visit. The latter are not. The distinction between on-premise signs and off-premise signs has long been accepted by courts as a reasonable basis for differential regulation.[11] Thus, as Mr. Justice Stevens has noted, "[a] state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere * * *." *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 68 & n.30 (plurality opinion), citing *Markham Advertising Co.* v. *State, supra.*

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[11]See, *e.g.*, *E.B. Elliott Advertising Co.* v. *Metropolitan Dade County*, 425 F. 2d 1141, 1152-1155 (5th Cir.), cert. dismissed, 400 U.S. 805 (1970); *Board of Adjustment* v. *Osage Oil & Transportation, Inc.*, 258 Ark. 91, 522 S.W.2d 836, 837-838, cert. denied and appeal dismissed, 423 U.S. 941 (1975); *Metromedia, Inc.* v. *City of San Diego, supra*; *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 211-212, 193 N.E. 799, 828, appeals dismissed, 296 U.S. 543 (1935), 297 U.S. 725 (1936); *Opinion of the Justices*, 103 N.H. 268, 271, 169 A.2d 762, 764 (1961); *United Advertising Corp.* v. *Raritan*, 11 N.J. 144, 150-151, 93 A.2d 362, 365 (1952) (Brennan, J.).

Perhaps because respondent had not contended that her sign came within the Oklahoma Act's exemption for on-premise signs describing activities conducted on the property where the sign is located, the Oklahoma Supreme Court did not consider whether the exemption vitiates the content-neutral character of the statute.[12] We do not believe that the exemption necessarily creates such problems, because it does not differentiate between types of activities that may be described on signs or accord broader rights to some types of activities. Compare *Carey* v. *Brown*, No. 79-703 (June 20, 1980), slip op. 12-13 n.13.

In order to ensure that the exemption is applied in an impartial manner, the United States Department of Transportation, as part of an on-going assessment of the federal program, intends to conduct a rulemaking

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[12] The Oklahoma statute exempts "[o]n-premise activities signs advertising activities conducted on the property on which they are located, including but not limited to, goods sold, stored, manufactured, processed or mined thereon; services rendered thereon; and entertainment provided thereon." Okla. Stat. tit. 69, § 1274(b) (West 1969). The regulations explaining the exemption (Oklahoma Transportation Commission Rules, Regulations, Policies, and Procedures Adopted Dec. 6, 1976 (Revised Feb. 6, 1980), Art. IX-C, § 4(b)) include provisions that substantially track those issued by the United States Department of Transportation in defining the corresponding federal exemption. 23 C.F.R. 750.709. While the statute and the regulations seem primarily concerned with commercial establishments, their language does not preclude application of the exemption to activities in noncommercial establishments, including residential premises.

The applicability of the exemption to respondent's sign is obscure because the record does not show whether the sign is located on respondent's residential premises; her application for registration of the sign indicates only that the property is owned not by respondent but by "Ross Pile" (Exh. A to Plaintiff's Brief in Opposition to Defendant's Demurrer). Similarly the record does not show whether the sign relates to activities, *e.g.*, meetings, conducted there.

concerning the need for regulations to make it clear that the exemption applies to commercial and noncommercial activities alike and that residential premises may be considered noncommercial establishments. An advance notice of proposed rulemaking will be published in September 1980.

If this Court remands the case to the Oklahoma Supreme Court for clarification of the constitutional basis for its decision, the court below might, on an appropriate motion by petitioner, remand the case to the trial court for the submission of evidence bearing on the exemption question and on the availability of alternative locations for respondent's signs or of other channels of communication. Additionally, the State might be given the opportunity to apply its exemption in the light of the Department of Transportation's rulemaking proceedings. The case would then be appropriate for plenary review by this Court. That is not the situation today, however, both because of the uncertainty of the basis for the decision of the court below and because of the deficiencies in the record.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, vacate the judgment of the Oklahoma Supreme Court, and remand the case for clarification of the question whether the decision is supported by an adequate and independent nonfederal ground.

Respectfully submitted.

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APPENDIX

The current definition of "effective control" in the Highway Beautification Act of 1965, 23 U.S.C. (Supp. II) 131(c), provides:

> Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic

significance the preservation of which would be consistent with the purposes of this section, and signs, displays, and devices advertising the distribution of nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

The current definition of "effective control" in 23 C.F.R. 750.705 provides:

In order to provide effective control of outdoor advertising, the State must:

(a) Prohibit the erection of new signs other than those which fall under § 750.704(a)(1) through (6);

(b) Assure that signs erected under § 750.704(a)(4) and (5) comply, at a minimum, with size, lighting, and spacing criteria contained in the agreement between the Secretary and the State;

(c) Assure that signs erected under § 750.704(a)(1) comply with the national standards contained in Subpart B, Part 750, Chapter 1, 23 CFR;

(d) Remove illegal signs expeditiously;

(e) Remove nonconforming signs with just compensation within the time period set by 23 U.S.C. 131 (Subpart D, Part 750, Chapter 1, 23 CFR, sets forth policies for the acquisition and compensation for such signs);

(f) Assure that signs erected under § 750.704(a)(6) comply with § 750.710, Landmark Signs, if landmark signs are allowed;

(g) Establish criteria for determining which signs have been erected with the purpose of their message being read from the main-traveled way of an Interstate or primary highway, except where State law makes such criteria unnecessary. Where a sign is erected with the purpose of its message being read from two or more highways, one or more of which is a controlled highway, the more stringent of applicable control requirements will apply;

(h) Develop laws, regulations, and procedures to accomplish the requirements of this subpart;

(i) Establish enforcement procedures sufficient to discover illegally erected or maintained signs shortly after such occurrence and cause their prompt removal; and

(j) Submit regulations and enforcement procedures to FHWA for approval.